STATE OF MICHIGAN

COURT OF APPEALS

KRISTY L. SWANSON,

Plaintiff-Appellee,

V

LIVINGSTON COUNTY and LIVINGSTON COUNTY SHERIFF,

Defendants-Appellants.

UNPUBLISHED
March 24, 2005

No. 251483
Livingston Circuit Court
LC No. 02-019239-CZ

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's denial of their motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiff originally filed a sexual discrimination suit in federal court; that lawsuit was dismissed on defendants' motion for summary judgment. In the meantime, plaintiff filed this lawsuit in state court alleging the same theories of sexual discrimination and the same facts as alleged in the federal suit. Defendants' unsuccessful motion for summary disposition relied on the doctrines of collateral estoppel and res judicata. We reverse.

Plaintiff filed a sexual discrimination and retaliation lawsuit in federal court under Title VII, 42 USC § 2000e *et seq*. ("Title VII"), alleging a hostile work environment, and retaliation, and retaliatory harassment. Plaintiff's state court action, filed under the Michigan Civil Rights Act, MCL 37.2101 *et seq*., alleged a sexual discrimination claim identical to the sexual discrimination claim alleged in her federal lawsuit. She later filed a first amended complaint, adding retaliation and retaliatory harassment claims.

In federal court, defendants' motion for summary judgment under FR Civ P 56, was granted and all of plaintiff's claims were dismissed on the ground that there was no genuine issue of material fact.[1] In state court, defendants filed a motion for summary disposition under MCR 2.116(C)(7) on the grounds that plaintiff's claims were barred by the doctrines of collateral

[1] Affirmed on appeal, *Swanson v Livingston Co,* unpublished opinion of the Sixth Circuit Court of Appeals, issued 1/19/2005 (Docket No. 03-1798).

estoppel and res judicata. The trial court denied the motion, and defendants appeal from this order.

This Court reviews de novo "both a trial court's decision to grant or deny a motion for summary disposition and issues concerning the application of the doctrine of collateral estoppel." *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). Similarly, this Court reviews de novo the question whether res judicata bars a subsequent action. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). This Court reviews "a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(7) by considering the affidavits, pleadings, and other documentary evidence and construing them in the light most favorable to the nonmoving party." *Barrow*, *supra*. Collateral estoppel applies to preclude relitigation of issues actually and necessarily determined in a prior proceeding between the same parties. *Barrow, supra.* Summary disposition constitutes a determination on the merits for purposes of collateral estoppel. *City of Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990).

In her federal lawsuit, plaintiff brought her claims under Title VII. Count I of her first amended complaint alleges a hostile work environment. To establish a prima facie case of hostile environment sexual harassment under Title VII, a plaintiff must establish that:

> (1) the harassment was unwelcome; (2) the harassment was based on sex; (3) the harassing conduct was sufficiently severe or pervasive to affect the terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment; and (4) the harassment was committed by a supervisory personnel, who knew or should have known of the harassment and failed to take immediate and appropriate corrective action. [*Knox v Neaton Auto Products Mfg, Inc*, 375 F3d 451, 459 (CA 6, 2004).]

In her state court claim, plaintiff likewise alleges hostile environment harassment. By comparison to a Title VII theory of hostile environment harassment, to establish a claim of hostile environment harassment under the Civil Rights Act the plaintiff must prove the following elements:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and respondeat superior. [*Elezovic v Ford Motor Co*, 259 Mich App 187, 192-193; 673 NW2d 776 (2003).]

As in Title VII, under the Civil Rights Act an employer is not liable "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Radtke v Everett*, 442 Mich 368, 396; 501 NW2d 155 (1993).

The primary issue on which both federal and state theories of hostile environment harassment are contingent is whether a supervisor or coworker created an environment hostile toward a member of one sex sufficient to "alter the conditions of employment" for the victim. See *Radtke, supra* at 385, quoting *Lipsett v Univ of Puerto Rico,* 864 F2d 881, 897 (CA 1, 1988). Indeed, this is the "essence of a hostile work environment action." *Radtke, supra* at 385. It is not surprising that "the language of the Michigan Civil Rights Act strongly parallels language adopted by the Equal Employment Opportunity Commission, the agency vested by Congress to enforce Title VII, defining sexual discrimination." *Id.* at 381. Thus, to determine whether hostile environment harassment occurred, a court must reach and decide that underlying issue.

In the present case, the federal court reached and decided that precise question when it granted defendants' motion for summary judgment. *Swanson, supra* at 894-895. Noting that actionable harassment must be sufficiently severe to alter the conditions of the victim's employment, the federal court concluded that, under the totality of the circumstances, the "conduct does not appear to have been more than 'merely offensive.'" *Id.* at 895. Moreover, the federal court determined that Livingston County "took prompt remedial action" to remedy the problem, thus avoiding liability. *Id.* By the same method an employer may avoid liability under the Civil Rights Act. *Radtke, supra* at 396. Because the state court must answer these identical questions, plaintiff's hostile environment harassment claim is precluded under collateral estoppel.

Plaintiff's second theory in her Title VII lawsuit was retaliation. To establish a claim of retaliation under Title VII, a plaintiff must prove

> that (1) she engaged in an activity protected by Title VII, (2) the exercise of that protected right was known to the [employer], (3) the [employer] thereafter took an employment action adverse to [plaintiff], or that [plaintiff] was subjected to severe or pervasive retaliatory harassment by a supervisor, and (4) a causal connection existed between the protected activity and the adverse employment action or harassment." [*Akers v Alvey,* 338 F3d 491, 408 (CA 6, 2003).]

In her state claim, plaintiff also alleged retaliation. The elements of retaliation under the Civil Rights Act are identical to those under Title VII. "To establish a prima facie case of retaliation under the Civil Rights Act," the plaintiff must prove "(1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action." *Meyer v City of Center Line,* 242 Mich App 560, 568-569; 619 NW2d 182 (2000).

The elements of the federal and state retaliation claims are virtually identical, and it logically follows that the questions decided in the federal case are the same as those that must be decided in the pending state case. In the federal case, the federal court initially noted that plaintiff's one-day suspension supported a prima facie case of retaliation, yet it concluded that plaintiff failed to overcome defendants' non-discriminatory reason for the suspension. *Swanson, supra* at 897. In fact, she "was being disciplined for failing to abide by the jail's security regulations." *Id.* This issue was essential to the judgment, was litigated, and was determined by a final judgment. The state circuit court must reach and decide the very same question of fact in

its determination of whether retaliation occurred in violation of the Civil Rights Act. For that reason, plaintiff's state claim of retaliation is precluded by collateral estoppel.

Finally, plaintiff asserted a retaliatory harassment theory in her federal complaint. The alleged retaliatory harassment was by her coworkers. As the federal district court noted in *Swanson, supra* at 898, many federal circuits have recognized a Title VII cause of action for co-worker retaliatory harassment. See also *Morris v Oldham Co Fiscal Court*, 201 F3d 784, 792 (CA 6, 2000) ("Second and Tenth Circuits held that an employer can be liable for *co-workers'* retaliatory harassment"). To prove a prima facie case of Title VII retaliatory harassment, the plaintiff must prove that:

> (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, *or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor*; and (4) there was a causal connection between the protected activity and the adverse employment action *or harassment*. [*Morris, supra* at 792 (emphasis in original); see also *Akers, supra* at 497.]

Similarly, in her pending state action plaintiff asserted a retaliatory harassment theory. Under the Civil Rights Act, harassment by coworkers and a supervisor's failure to prevent the harassment can constitute retaliation. *Meyer, supra* at 569. The requisite "adverse employment action (1) must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff." *Id.* Moreover, when "the harassment is sufficiently severe, a supervisor's failure to take action to respond can constitute a materially adverse change in the conditions of employment." *Id.* at 571.

The federal district court in this case found that (1) the co-worker retaliatory harassment was not sufficiently severe to constitute a change in the conditions of employment, and that (2) Livingston County did not condone the alleged harassment. *Swanson, supra* at 900. Because these same issues must necessarily be decided with respect to the retaliatory harassment claim in the pending state case, the claim is precluded by collateral estoppel.

Plaintiff's claims are also precluded by the related doctrine of res judicata, which is used "to prevent multiple suits litigating the same cause of action." *Adair, supra* at 121. Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.*

The first prong is satisfied because the previous lawsuit was resolved by the granting of defendants' motion for summary judgment. Summary disposition constitutes a judgment on the merits for purposes of res judicata. *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Further, both the federal and pending state actions involve the same parties or their privies. Kristy L. Swanson is the plaintiff in both actions and Livingston County and the Livingston County Sheriff are the defendants in both actions. Plaintiff's federal complaint alleges a hostile work environment, retaliation, and retaliatory harassment, and plaintiff alleges the same theories in her state complaint. As discussed in detail above, these causes of action were litigated and resolved in the federal lawsuit, and "the factual

basis for plaintiff's Title VII claim is the same as the factual basis for [her] Elliott-Larsen Civil Rights claim." *Chakan v The City of Detroit*, 998 F Supp 779 (ED Mich, 1998) (after the plaintiff's Michigan Civil Rights Act action was dismissed in state court, the plaintiff's Title VII claim in federal court was dismissed under doctrines of collateral estoppel and res judicata because same issues were actually litigated in both cases to a final decision on the merits). Thus, plaintiff's state court claim is barred by res judicata.

Plaintiff argues that collateral estoppel does not apply to her state law claim in part because the legal standards for establishing claims of a hostile work environment, retaliation, and retaliatory harassment under Title VII and the Michigan Civil Rights Act are different. However, the standards for these claims under Title VII and the Civil Rights Act are at least equivalent or substantially similar, if not identical. More importantly, it is the issues, not the legal standards, that must be the same for collateral estoppel to apply. Those issues are the same in the present case.

We reverse and remand for entry of an order granting summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Joel P .Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette